

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. GALANTE,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 05-06739
	:	
v.	:	
	:	
CHRISTOPHER COX, CHAIRMAN	:	
SECURITIES AND EXCHANGE	:	
COMMISSION,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

Stengel, J.

May 16, 2006

This employment discrimination action arises out of a series of decisions by the United States Securities and Exchange Commission (the "SEC") not to re-hire plaintiff John A. Galante ("Plaintiff"). Plaintiff alleges that the SEC's decisions not to re-hire him constitutes age discrimination. Presently before the Court is a motion to dismiss or, in the alternative, for partial summary judgment filed by defendant Christopher Cox, Chairman of the SEC ("Defendant"). For the reasons that follow, I will grant Defendant's motion in part and deny it in part.

I. BACKGROUND

Plaintiff worked in the SEC's Philadelphia District Office (the "PDO") for two separate periods of time before he commenced this action. The SEC originally hired

Plaintiff as a securities compliance examiner at the PDO in July of 1973. Plaintiff left his position with the SEC in December of 1978 to work at the Philadelphia Stock Exchange. In September of 1992, Plaintiff left his position at the Philadelphia Stock Exchange and the SEC re-hired him as a securities compliance examiner at the PDO. Plaintiff became a staff accountant for the SEC in 1995, but resigned a second time to work for a financial consulting firm in December of 2000.¹

Plaintiff left his position with the financial consulting firm after approximately three months and applied for 17 job vacancy announcements posted by the SEC between 2001 and 2004. Plaintiff applied for the following job vacancy announcements:

<u>Position</u>	<u>Announcement No.</u>	<u>Closing Date</u>	<u>No. of Vacancies</u>
Staff Accountant	DEU-01-175	5/31/01	1
Staff Accountant	DEU-01-163	6/23/01	3
Staff Accountant	DEU-02-009	10/30/01	Multiple
Staff Accountant	DEU-02-004	11/9/01	1
Staff Accountant	DEU-02-039	3/22/02	2
Staff Accountant	DEU-02-040	5/3/02	Multiple
Staff Accountant	DEU-02-066	9/24/02	2
Staff Accountant	DEU-03-058	3/21/03	3
Staff Accountant	DEU-03-085	5/7/03	30
Staff Accountant	DEU-03-117	6/26/03	Multiple

¹Plaintiff resigned from the SEC for the second time as a GS-14, Step 8 team leader in the PDO's Broker-Dealer Examination Unit.

Staff Accountant	ESHA-001	8/1/03	Multiple
Staff Accountant	ESHA-02-020-MB	8/1/03	4
Staff Accountant	ESHA-015	8/1/03	16
Staff Accountant	ESHA-03-028	9/24/03	4
Sec. Compl. Exam.	ESHA-002	9/30/03	20
Staff Accountant	ESHA-03-087-DC	12/3/03	Multiple
Staff Accountant	ESHA-04-001-MB	2/5/04	Multiple

Unfortunately for Plaintiff, however, the SEC decided not to re-hire him for any of these positions.

After the SEC rejected his final application on February 23, 2004, Plaintiff (who was over the age of 40) contacted the SEC's equal employment opportunity office (the "EEOO") and asserted that he had not been re-hired on account of his age. Plaintiff filed a formal administrative complaint with the EEOO on June 2, 2004, and the EEOO informed Plaintiff that it would accept his allegations relating to non-selection for job vacancy announcements ESHA-02-020-MB and ESHA 04-001-MB on July 22, 2004. However, the SEC requested additional information relating to Plaintiff's other 15 claims of non-selection to ascertain whether they were timely. Specifically, the EEOO wished to determine whether Plaintiff's claims were untimely for failing to contact an EEOO counselor within 45 days of the alleged discrimination.

On October 28, 2004, Plaintiff's counsel responded to the SEC's information request by letter. Plaintiff's counsel admitted in his letter that Plaintiff's other 15 non-selection claims were untimely, but argued that his failure to seek EEOO counseling should be excused:

It cannot be denied that the specific non-selections that the [SEC] has not accepted had not occurred within 45 days from the date Mr. Galante first sought counseling. However, Mr. Galante had no reasonable basis to believe that the [SEC] was engaging in a systematic pattern of discrimination against him based upon age, until he received a series of rejections.

On November 29, 2004, the SEC informed Plaintiff's counsel by letter that it would dismiss Plaintiff's claims relating to the following 14 job vacancy announcements as untimely: (1) DEU-01-175; (2) DEU-01-163; (3) DEU-02-009; (4) DEU-02-004; (5) DEU-02-039; (6) DEU-02-040; (7) DEU-02-066; (8) DEU-03-058; (9) DEU-03-085; (10) DEU-03-117; (11) ESHA-015; (12) ESHA-03-028-DC; (13) ESHA-03-002; and (14) ESHA-03-087-DC (collectively the "Untimely Claims"). The SEC also dismissed Plaintiff's claim relating to job vacancy announcement ESHA 03-020-MB for failure to state a claim because the SEC had withdrawn the announcement and did not hire anyone for the position.

The only two claims accepted for investigation by the SEC, therefore, were whether the SEC discriminated against Plaintiff: (1) "on the basis of his age (D.O.B. 4/18/47) when it failed to select him for the position of Staff Accountant pursuant to

[job] [v]acancy [a]nnouncement ESHA 04-001-MB;" and (2) "when it failed to select him for the position of Staff Accountant in the [PDO] pursuant to [job] [v]acancy [a]nnouncement ESHA 001." On September 19, 2005, Administrative Law Judge Francis A. Polito issued a Decision and Order denying Plaintiff's two remaining age discrimination claims.

Plaintiff filed the instant action on December 27, 2005, alleging a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (the "ADEA").² Defendant filed the present motion to dismiss or, in the alternative, for partial summary judgment on February 27, 2006. No discovery has been taken in this case, as Defendant filed the instant motion prior to the Rule 16 status conference. Plaintiff responded to the motion on March 27, 2006, but instead of opposing Defendant's arguments, Plaintiff requests that I deny the motion without prejudice because the parties have not engaged in any discovery.

²The complaint appears to allege that Plaintiff seeks relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* ("Title VII"). See Compl. ¶ 2. The complaint also alleges that the SEC discriminated against Plaintiff based on his age. See Compl. ¶ 12 (stating that the SEC "engaged in a systematic pattern of discrimination against [Plaintiff] on the basis of his age"). See also Compl. ¶ 14 ("[Plaintiff . . . requests . . . a trial *de novo* . . . on all issues in his complaint of discrimination based on age") (emphasis in original). In fact, the complaint does not allege that the SEC discriminated against Plaintiff based on anything *other* than his age. Title VII by its terms does not apply to age. See 42 U.S.C. 2000e *et seq.* See also Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 586-87 (2004) ("Congress chose not to include age within [the] discrimination forbidden by Title VII of the Civil Rights Act of 1964 . . ."). Accordingly, I will read the complaint to allege an age discrimination claim under the ADEA and not a claim under Title VII.

II. LEGAL STANDARDS

A. Motion to Dismiss Under Rule 12(b)(6)

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of a complaint. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). Courts may grant a motion to dismiss only where "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). When considering a motion to dismiss, courts must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Id. See also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984). A plaintiff, however, must plead specific factual allegations. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pa. Transp. Auth., 897 F. Supp. 893 (E.D. Pa. 1995).

B. Motion for Summary Judgment Under Rule 56(c)

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party initially bears the burden of showing the absence of a

genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply by demonstrating "to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. A fact is "material" only when it could affect the result of the lawsuit under the applicable law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." Id. The moving party must establish that there is no triable issue of fact as to all of the elements of any issue on which the moving party bears the burden of proof at trial. See In re Bessman, 327 F.3d 229, 237-38 (3d Cir. 2003) (citations omitted).

Once the moving party has carried its burden, the non-moving party must come forward with specific facts demonstrating that there is a genuine issue for trial. Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A motion for summary judgment looks beyond the pleadings, and factual specificity is required of the party opposing the motion. Celotex, 477 U.S. at 322-23. In other words, the non-moving party may not merely restate allegations made in its pleadings or rely upon "self-serving conclusions, unsupported by specific facts in the record." Id. Rather, the non-moving party must support each essential element of its claim with specific evidence from the record. See id.

A district court analyzing a motion for summary judgment "must view the facts in the light most favorable to the non-moving party" and make every reasonable inference in favor of that party. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citations omitted). Summary judgment is therefore appropriate when the court determines that there is no genuine issue of material fact after viewing all reasonable inferences in favor of the non-moving party. See Celotex, 477 U.S. at 322.

III. DISCUSSION

A. Each Non-Selection is a Separate Discrimination Claim

As an initial matter, I note that I must treat each alleged non-selection in this case as a distinct employment discrimination claim. The Supreme Court has stated that an employer's refusal to hire a person is a "discrete act." Nat'l R.R. Pass. Corp. v. Morgan, 536 U.S. 101, 114 (2002). The Court therefore views multiple non-selections as separate and distinct claims of employment discrimination. Id. (holding that each discrete act "such as . . . [a] failure to promote . . . or [a] refusal to hire" constitutes "a separate actionable 'unlawful employment practice'"). By contrast, a plaintiff alleging a hostile work environment may use all conduct by the defendant over a period of time as evidence of a pattern of discrimination, so long as at least one action took place within the appropriate limitations period. Id.

In this case, Plaintiff has alleged a number of non-selection (refusal to hire) claims against the SEC. Under Morgan, I may not view the 17 instances of non-selection as a "systematic pattern" of age discrimination as Plaintiff appears to contend. Rather, I must treat the SEC's decision not to hire Plaintiff for each job vacancy announcement as a separate and distinct claim of employment discrimination.

B. The ADEA Framework for Federal Employees

The ADEA generally protects workers over the age of 40 from employment discrimination based on their age. See 29 U.S.C. § 621 *et seq.* Courts analyze ADEA claims using the burden-shifting procedure set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-4 (1972). Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000). A plaintiff asserting a claim of age discrimination bears the burden of initially establishing a prima facie case of discrimination by a preponderance of the evidence. Sarullo v. United States Postal Serv., 352 F.3d 789, 797 (3d Cir. 2003). To establish a prima facie case of age discrimination, a plaintiff must demonstrate that "(1) [he or she] is over forty, (2) is qualified for the position in question, (3) suffered from an adverse employment decision, and (4) that [his or her] replacement was sufficiently younger to permit a reasonable inference of age discrimination." Potence v. Hazleton Area Sch. Dist., 357 F.3d 366, 370 (3d Cir. 2004).

If the plaintiff makes its initial showing, the burden shifts to the defendant to articulate some legitimate and nondiscriminatory reason for the employer's decision. Sarullo, 352 F.3d at 797. Should the defendant meet its burden, the presumption of a discriminatory action raised by the prima facie case is rebutted. Id. The plaintiff must then demonstrate by a preponderance of the evidence that the employer's articulated reason was merely a pretext for discrimination, and not the actual motivation behind its decision. Id.

The ADEA provides employees of the federal government with two separate avenues for pursuing age discrimination claims. First, the federal employee may elect to pursue a claim through the administrative process by filing a complaint with the EEOC. 29 U.S.C. § 633a(b)(3). Second, the employee may file an action directly in federal court after providing the EEOC with 30 days' notice of his or her intent to file suit. 29 U.S.C. §§ 633a(c)–(d). With regard to the latter option, the aggrieved employee must file a notice of intent to file suit within 180 days of the alleged unlawful employment practice.

The ADEA applies to Plaintiff in this case because he has alleged that his date of birth is April 18, 1947, and he was therefore over the age of 40 at the time of the alleged discrimination. Plaintiff's complaint also alleges that he filed a formal complaint of discrimination with the EEOO. Plaintiff has therefore elected to pursue his discrimination claim against the SEC by initiating the ADEA's administrative remedies described in 29 U.S.C. § 633a(b)(3), instead of filing this action directly in federal court.

C. The Untimely Claims

An employee who files an employment discrimination administrative complaint with the EEOC pursuant to 29 U.S.C. § 633a(b)(3) must "consult a Counselor" prior to filing a formal complaint in order to attempt to resolve the matter informally. 29 C.F.R. § 1614.105(a). The employee must "initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). If the counselor does not resolve the matter, the counselor must inform the employee in writing of the employee's right to file a formal administrative complaint with the EEOC. 29 C.F.R. § 1614.105(d). The employee must then file his or her formal complaint within 15 days of receiving the counselor's notice. Id.

The Third Circuit has held that an aggrieved employee who elects to pursue his or her ADEA administrative remedies must complete the process before filing a complaint in federal court. Purtill v. Harris, 658 F.2d 134, 138 (3d Cir. 1981). The Third Circuit explained the reasoning behind its holding in Purtill by noting that:

Allowing a plaintiff to abandon the administrative remedies he has initiated would tend to frustrate the ability of the agency to deal with complaints. All participants would know that at any moment an impatient complainant could take his claim to court and abort the administrative proceedings.

Moreover, such a course would unnecessarily burden courts with cases that otherwise might be terminated successfully by mediation and conciliation.

Purtill, 658 F.2d at 138.

Here, Plaintiff has chosen to pursue his claim by initiating the administrative remedies of 29 U.S.C. § 633a(b)(3) described above. Therefore, he must completely exhaust his administrative remedies before filing a federal action under the Morgan case.

Courts in the Third Circuit have held that a plaintiff bringing an ADEA claim must meet all of the administrative preconditions to filing the lawsuit in federal court. Word v. Potter, 149 Fed. Appx. 97, 100 (3d Cir. Sept. 20, 2005) (affirming grant of summary judgment on Title VII claim for failure to comply with 29 C.F.R. § 1614.105). See also Rodriguez v. United States Postal Serv., No. 04-916, 2005 WL 486610, at *5 (E.D. Pa. March 1, 2005) (citing Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997)) (granting defendant's motion to dismiss ADEA claim because, *inter alia*, plaintiff failed to allege that he had met the administrative preconditions to filing in federal court).

Similarly, I will grant Defendant's motion with respect to the Untimely Claims in this case for Plaintiff's failure to demonstrate that he has completely exhausted his administrative remedies. Neither the complaint nor the record demonstrates that Plaintiff ever consulted an EEOC counselor before filing his formal complaint for the Untimely Claims. Consulting with an EEOC counselor within 45 days of the alleged

discrimination is an administrative prerequisite to bringing this action in federal court.

See 29 C.F.R. § 1614.105(a). As a result, Defendant's motion is granted with respect to the Untimely Claims.³

B. The Remaining Claims

After granting Defendant's motion with respect to the Untimely Claims, Plaintiff's three remaining claims are for job vacancy announcements ESHA 03-020-MB, ESHA 04-001-MB, and ESHA 001. While it does not appear that Plaintiff has alleged or demonstrated sufficient facts to save these remaining claims, I will allow Plaintiff a limited period of discovery to investigate the facts substantiating his claims. Defendant may file a renewed motion for summary judgment after the discovery period ends.

IV. CONCLUSION

For the reasons described above, I will grant Defendant's motion with respect to Plaintiff's discrimination claims based on the following job vacancy announcements:

(1) DEU-01-175; (2) DEU-01-163; (3) DEU-02-009; (4) DEU-02-004; (5) DEU-02-039; (6) DEU-02-040; (7) DEU-02-066; (8) DEU-03-058; (9) DEU-03-085; (10) DEU-03-

³Moreover, I will not equitably toll 29 C.F.R. § 1614.105(a)'s 45 day deadline with respect to Plaintiff's claims. The Third Circuit has held that equitable tolling will generally suspend the running of a statute of limitations in three situations: "(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994) (citations omitted). Equitable tolling requires a plaintiff to demonstrate "that he or she could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim." Id. at 1390 (citation omitted).

Nothing in this record suggests that any of the scenarios described by the Third Circuit in Oshiver are implicated here. Nor does the record provide any indication that Plaintiff could not have filed his claims on time by exercising reasonable diligence. I therefore decline to equitably toll the 29 C.F.R. § 1614.105(a) deadline.

117; (11) ESHA-015; (12) ESHA-03-028-DC; (13) ESHA-03-002; and (14) ESHA-03-087-DC. I will deny Defendant's motion with respect to the following job vacancy announcements: (1) ESHA 03-020-MB; (2) ESHA 04-001-MB; and (3) ESHA 001. An appropriate Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. GALANTE,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 05-06739
	:	
v.	:	
	:	
CHRISTOPHER COX, CHAIRMAN	:	
SECURITIES AND EXCHANGE	:	
COMMISSION,	:	
	:	
Defendant.	:	

AND NOW, this 16th day of May, 2006, upon consideration of Defendant's Motion to Dismiss or, in the Alternative, for Partial Summary Judgment (Docket No. 3) and Plaintiff's response thereto (Docket No. 7), it is hereby **ORDERED** that the motion is **GRANTED** with respect to job vacancy announcements: (1) DEU-01-175; (2) DEU-01-163; (3) DEU-02-009; (4) DEU-02-004; (5) DEU-02-039; (6) DEU-02-040; (7) DEU-02-066; (8) DEU-03-058; (9) DEU-03-085; (10) DEU-03-117; (11) ESHA-015; (12) ESHA-03-028-DC; (13) ESHA-03-002; and (14) ESHA-03-087-DC.

It is further **ORDERED** that the motion is **DENIED** with respect to job vacancy announcements: (1) ESHA 03-020-MB; (2) ESHA 04-001-MB; and (3) ESHA 001.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.